

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
COUNTY OF MARIN, CALIFORNIA)	File No. 0002745578
)	
Request for Waiver Pursuant to Section 337(c) of)	
the Communications Act of 1934, as Amended)	

ORDER

Adopted: May 18, 2007

Released: May 21, 2007

By the Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. We have before us an application and associated waiver request filed by the County of Marin, California (Marin County), seeking authority to operate its public safety communications system on Part 22 point-to-multipoint paging control frequencies in the 470-512 MHz band.¹ Because Marin County seeks to operate on frequencies not designated for public safety entities, it requires a waiver of Sections 22.501, 22.621, and 90.303 of the Commission's rules,² pursuant to Section 337(c) of the Communications Act of 1934, as amended (the Act).³ Marin County also requests Special Temporary Authority (STA) to operate on the requested frequencies, while its application remains pending.⁴ For the reasons stated below, we deny Marin County's request for waiver, dismiss the request for STA without prejudice, and dismiss the application without prejudice.

II. BACKGROUND

2. The 470-512 MHz band is allocated for land mobile radio use on a geographically shared basis with TV broadcast stations.⁵ Frequencies in TV Channels 16 and 17 are available for assignment to land mobile radio and paging operations in the San Francisco/Oakland, California urbanized area.⁶ Marin County, located within California's San Francisco metropolitan area, is a local governmental entity providing law enforcement and fire services to its residents.⁷ Marin County states that it seeks to use the subject Part 22 frequencies to support its "existing integrated Law Enforcement and Fire Service communications system" and to "alleviate a critical shortage of available channels in the San Francisco

¹ See FCC File No. 0002745578 (filed Sept. 11, 2006, amended Sept. 13, 2006 and Sept. 14, 2006), and accompanying Request for Waiver and Special Temporary Authority, dated July 12, 2006 (Waiver Request). Marin County requests authorization to operate on frequency pair 482/485.2375 MHz and frequencies 485.0375 MHz, 485.0875 MHz, 485.1125 MHz, 485.2375 MHz, 485.2625 MHz, 485.2875 MHz, 491.0375 MHz, 491.0625 MHz, 491.1125 MHz, and 491.1625 MHz.

² 47 C.F.R. §§ 22.501, 22.621, 90.303.

³ 47 U.S.C. § 337(c).

⁴ Waiver Request at 1-2.

⁵ See 47 C.F.R. §§ 2.106, 90.301.

⁶ See 47 C.F.R. § 90.303(b).

⁷ Waiver Request at 1.

area.”⁸ Marin County states that it proposes to use one frequency pair as a conventional mobile/mobile relay channel and to use ten simplex frequencies as low-power channels for “on-scene” or “tactical” use.⁹

3. Marin County contends that it needs to use the paging frequencies because “there are no suitable frequencies available” in the land mobile portions of the 470-512 MHz band in the San Francisco metropolitan area.¹⁰ It also notes that a similar waiver request filed by San Mateo County in the San Francisco area was granted previously to allow San Mateo County to use Part 22 paging frequencies in the 470-512 MHz band.¹¹ Accordingly, Marin County requests a waiver of Sections 22.501, 22.621, and 90.303,¹² and other sections of the rules as may be necessary,¹³ pursuant to Section 337(c) of the Act.¹⁴ Marin County also seeks an STA to operate on the requested frequencies.¹⁵

III. DISCUSSION

4. *Request for Waiver Pursuant to Section 337(c) of the Act.* Section 337(c) provides that the Commission must waive any rules necessary to authorize any “entity seeking to provide public safety services” to operate on unassigned non-public safety spectrum, if the Commission makes five specific findings regarding the entity’s application:

- (A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;
- (B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission’s regulations;

⁸ *Id.* Marin County is currently licensed under call signs WPLU940, WPQE397, and WPQE391. See FCC File No. 0002745578, FCC Form 601 – Schedule H at 1.

⁹ See Waiver Request at 2. Marin County also proposes to deploy facilities at five fixed locations and one mobile location using the requested frequencies. See FCC File No. 0002745578, FCC Form 601 – Schedule D at 1-6.

¹⁰ Waiver Request at 2.

¹¹ *Id.* at 1 (citing County of San Mateo, California, *Memorandum Opinion and Order*, 14 FCC Rcd 19002 (WTB 1999) (*San Mateo*)).

¹² See Waiver Request at 1. Section 22.501 defines the scope of the licensing and operation of the Public Paging and Telephone Service. See 47 C.F.R. § 22.501. Section 22.621 sets forth frequencies, some of which are in the 470-512 MHz Band, that are available for point-to-multipoint systems. See 47 C.F.R. §§ 22.621. Section 90.303 provides the frequency bands in the 470-512 MHz Band that are available for assignment to land mobile radio users in thirteen urbanized areas of the United States, including the San Francisco/Oakland, CA urbanized area. See 47 C.F.R. § 90.303.

¹³ Marin County also would require a waiver of Section 90.311(a) to the extent that the requested Part 22 frequencies are not included in the ranges of land mobile frequencies listed in that section for the San Francisco/Oakland, California area. See 47 C.F.R. § 90.311(a). Section 90.311(a) lists the frequency ranges that are available within the specific frequency bands provided by Section 90.303. *Id.*; 47 C.F.R. § 90.303.

¹⁴ In addition to seeking waiver relief pursuant to Section 337(c) of the Act, Marin County requests the waiver pursuant to Section 90.15 of the Commission’s rules, 47 C.F.R. § 90.15. Waiver Request at 1. Section 90.15 does not provide a procedural means to seek waiver relief, but rather defines the scope of entities eligible for licenses in the Public Safety Radio Pool. See 47 C.F.R. § 90.15.

¹⁵ Waiver Request at 1. Marin County states that “[i]mmediate authorization is essential to enable the County to exercise its responsibilities, and a delay...would seriously diminish those capabilities, seriously prejudicing the public interest and safety in the County.” *Id.* at 2.

- (C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;
- (D) the unassigned frequency was allocated for its present use not less than two years prior to the date on which the application is granted; and
- (E) granting such application is consistent with the public interest.¹⁶

5. When considering requests under Section 337, we must first determine whether the applicant is an “entity seeking to provide public safety services.”¹⁷ Marin County explains that it is responsible for ensuring public safety, including performing law enforcement, fire suppression, firefighting, and homeland security functions in its extensive urban, suburban, and rural areas.¹⁸ Marin County submits that the requested facilities would be used to support its existing public safety communications system.¹⁹ Based on the record, we conclude that Marin County is an entity providing public safety services. Next, we consider whether Marin County satisfies the other requirements supporting a waiver under Section 337(c). We note that an applicant’s failure to satisfy a single criterion of Section 337(c) constitutes sufficient cause for the Commission to deny a request for waiver.²⁰ As discussed below, we find that Marin County has not satisfied the first criterion of Section 337(c). Therefore, we deny the Waiver Request.

6. *No other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use.* Based on the information before us, we are not convinced that Marin County has satisfied the first criterion. Marin County contends that a search of the Commission’s Universal Licensing System (ULS) database and coordination with the appropriate frequency coordinator show that there are “no suitable frequencies available” in the land mobile portion of the 470-512 MHz band for public safety communications.²¹ We find this statement insufficient because there is no explicit showing that it is based on an examination of all bands available for public safety use in the proposed area of service.²² An adequate showing would include, for example, a current frequency search in the 30-50 MHz, 150-174 MHz, 450-470 MHz, 470-512 MHz, 764-776/794-806 MHz, and 806-824/851-869 MHz

¹⁶ 47 U.S.C. § 337(c)(1).

¹⁷ *Id.* Section 337(f) defines the term “public safety services” as “services—

- (A) the sole or principal purpose of which is to protect the safety of life, health, or property;
- (B) that are provided—
 - (i) by State or local government entities; or
 - (ii) by non-government organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and
- (C) that are not made commercially available to the public by the provider.” 47 U.S.C. § 337(f).

¹⁸ Waiver Request at 1.

¹⁹ *Id.*

²⁰ See State of Ohio, *Memorandum Opinion and Order*, 17 FCC Rcd 439, 445 ¶ 13 (WTB PSPWD 2002) (*Ohio*); University of Southern California, *Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2984 ¶ 15 (WTB PSPWD 2001) (*University of Southern California*).

²¹ Waiver Request at 2.

²² See Hauppauge Fire District, *Memorandum Opinion and Order*, 15 FCC Rcd 12581, 12584 ¶ 8 (WTB 2000), citing *San Mateo*, 14 FCC Rcd at 19007 ¶ 11; *Ohio*, 17 FCC Rcd at 446-47 ¶ 15 (noting that an applicant seeking relief under Section 337 must show that there is insufficient spectrum in any band in the geographic area).

bands.²³ Rather than provide pertinent documentation demonstrating the results of a thorough frequency search, Marin County's engineering report merely states that it is "well known and can be documented that there are no 'unused' or even potentially useable channels in any Part 90 band in the San Francisco Bay Area whether it be Low Band 30-50 MHz, High Band 150-174 MHz, UHF 450-470 or 800 MHz radio bands, so the search concentrating on T Band was reasonable."²⁴

7. We also disagree with Marin County that the Waiver Request is similar to the waiver granted to San Mateo County, "another public safety agency in the San Francisco area under similar conditions."²⁵ The decision in *San Mateo* is distinguishable from the instant Waiver Request because, unlike Marin County, San Mateo County provided detailed and specific documentation to show that all Part 90 frequencies in the San Francisco Bay area were unavailable, in addition to a letter from the frequency coordinator certifying that no UHF, VHF or 800 MHz frequencies were then available for San Mateo County's use.²⁶ However, the frequency coordinator's letter submitted by Marin County is not persuasive because it is unclear whether the conclusion is based on an examination of all spectrum allocated to public safety services applicable to Marin County's proposed area of operation.²⁷ The relevant portion of the letter merely states that "due to the expanded coverage from [Marin County's proposed Mount Tamalpais location,] I can not find any available channels in the existing channel allotments for Public Safety Services that I can recommend that would not result in interference either to the County or to a co-channel or adjacent channel licensee."²⁸ In the absence of a more definitive and comprehensive showing, we find that the frequency coordinator's letter does not satisfy the criterion that "[n]o other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use."²⁹ Further, in view of the significant period of time that has elapsed between the 1999 decision in *San Mateo* and the Waiver Request, we are not persuaded by Marin County's analogy to *San Mateo* to claim that "similar conditions" regarding the immediate unavailability of public safety spectrum continue to exist today. Even if Marin County can substantiate its claim, we find that it has not done so here. Because Marin County has not satisfied the first criterion, we therefore deny the Waiver Request pursuant to Section 337(c).³⁰

²³ See Report to Congress on the Study to Assess the Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State, and Local Emergency Response Providers, WT Docket No. 05-157 at 4-5 ¶ 5 (Dec. 16, 2005), submitted pursuant to Intelligence Reform Act, Pub. L. No. 108-458, 118 Stat. 3638 § 7502(d)(1) (2004), codified at 6 U.S.C. § 413. See also 47 C.F.R. § 90.20(c)(3) (Public Safety Pool Frequency Table).

²⁴ See Waiver Request, attached "Engineering Report Additional T Band Channels for Marin County," prepared by C.S.I. Telecommunications, dated June 28, 2006, at 1.

²⁵ Waiver Request at 1 (referring to the "waivers . . . granted in 1999 for other 470-512 MHz ('T-Band') frequencies to San Mateo County").

²⁶ See *San Mateo*, 14 FCC Rcd at 19007 ¶ 11 nn.25-26.

²⁷ See File No. 0002745578, attached letter from Art McDole, Northern California Frequency Advisor, to Ms. Shelly Grant, Supervising Communications Technical Manager, County of Marin, California, dated June 22, 2006.

²⁸ *Id.* Mount Tamalpais is one of the five fixed locations that Marin County includes in its application. See File No. 0002745578.

²⁹ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, 22769 ¶ 132 (2000) (*Section 337 Report and Order and Further Notice*).

³⁰ See *Ohio*, 17 FCC Rcd at 445 ¶ 13; *University of Southern California*, 16 FCC Rcd at 2984 ¶ 15. We caution Marin County not to draw an inference from our decision that the remaining Section 337(c) criteria, unaddressed by this *Order*, have been satisfied.

8. *Request for Special Temporary Authority.* Lastly, we consider Marin County's request for an STA. The purpose of STA in this instance would be to permit Marin County to operate new or modified equipment in circumstances requiring immediate or temporary use of a station, pending an application for authorization.³¹ Section 1.931(a) specifies the conditions and procedures that must be satisfied in order for an STA to be granted.³² In particular, this rule requires requests for STA to be filed on FCC Form 601.³³ Here, because Marin County's request for STA was not filed on FCC Form 601 as required by Section 1.931(a), it is defective procedurally.³⁴ While the Commission may waive this filing requirement, in the absence of either a showing of "extraordinary circumstances" warranting such action by the Commission, we decline to do so here.³⁵ We therefore dismiss without prejudice the request for STA.³⁶

IV. CONCLUSION

9. Based on the record before us, we deny the Waiver Request and dismiss Marin County's application without prejudice because the Waiver Request fails to satisfy the first criterion set forth in Section 337(c) of the Act. For the reasons stated herein, we also dismiss the request for an STA.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 309(f), and Section 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(f), 337(c), and Section 1.931 of the Commission's rules, 47 C.F.R. § 1.931, the Request for Waiver and Special Temporary Authority associated with the captioned application filed by the County of Marin, California on September 11, 2006, as amended September 13, 2006 and September 14, 2006, IS DENIED, and the application for File No. 0002745578 IS DISMISSED without prejudice consistent with this Order and the Commission's rules.

11. IT IS FURTHER ORDERED that the request for Special Temporary Authority filed as part of the above Request for Waiver and Special Temporary Authority, associated with the captioned application filed by the County of Marin, California, on September 11, 2006, as amended September 13, 2006 and September 14, 2006, IS DISMISSED without prejudice.

³¹ See 47 C.F.R. § 1.931(a).

³² *Id.*

³³ *Id.*

³⁴ The request for STA also is procedurally defective to the extent Marin County failed to indicate correctly its intent to seek an STA in the application submitted with the Waiver Request. See File No. 0002745578, FCC Form 601 – Main Form, page 1, Item 3(a) (inserting "N," indicating that the Marin County is not seeking an STA).

³⁵ The Commission has authority to grant an STA for a period not to exceed 180 days "if there are extraordinary circumstances requiring temporary operations" 47 U.S.C. § 309(f).

³⁶ In reaching this determination, we emphasize that should Marin County determine that an STA is necessary, it should file a specific request for STA via ULS as provided on FCC Form 601 showing the complete details about "the circumstances that fully justify and necessitate" the grant of STA. See 47 C.F.R. § 1.931(a)(1). See also <http://www.fcc.gov/pshs/emergency/sta.html> (providing general information on STAs and relevant points of contact).

12. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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